88-1942

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

MARIO BERNAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether Fed. R. Crim. P. 11(h)—which provides that "[a]ny variance" from the plea procedures required by Rule 11 "which does not affect substantial rights shall be disregarded"—permits "automatic reversal" of a conviction based upon a guilty plea whenever a district court does not personally address a defendant concerning the nature of the offense to which the plea is offered.

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MARIO BERNAL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 861 F.2d 434. The order of the court of appeals denying the government's petition for rehearing (App., *infra*, 11a-12a) is reported at 871 F.2d 490.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 10a) was entered on November 25, 1988. A petition for rehearing was denied on April 4, 1989 (App., *infra*, 11a-12a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Subsections (c)(1) and (h) of Fed. R. Crim. P. 11 provide:

> (c) **Advice to Defendant.** Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole term or term of supervised release and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; * * *
>
> (h) **Harmless Error.** Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

STATEMENT

Respondent Mario Bernal was convicted upon his plea of guilty to one count of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 12 years' imprisonment without parole, to be followed by four years' supervised release. The court of appeals held that the district court violated Fed. R. Crim. P. 11(c)(1) by failing personally to address respondent concerning the nature of the offense to which he pleaded guilty. Adhering to the rule of "automatic reversal" that it adopted in *United States* v. *Dayton*, 604 F.2d 931 (5th Cir. 1979) (en banc), cert. denied, 445 U.S. 904 (1980), the court of appeals reversed respondent's conviction and remanded with instructions to allow respondent to replead.

1. Respondent and a co-defendant were arrested while in the process of selling approximately a kilogram of cocaine to an undercover DEA agent. See App., *infra*, 15a. In two previous transactions, they had sold another one-and-a-quarter kilograms to the same agent. *Ibid.* They were subsequently charged with one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and three counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1).

After initially pleading not guilty, respondent entered into a written plea agreement with the government. App., *infra*, 13a-14a. He agreed to plead guilty to Count 4 of the indictment, the count charging him with distributing cocaine to the government's agent at the time of his arrest; the government agreed to dismiss Counts 1 through 3; and the parties agreed that the maximum term of imprisonment would be 15 years without eligibility for parole. *Ibid.*

The plea agreement also specified the elements of the offense to which respondent was to plead guilty and the factual basis for the plea. App., *infra*, 13a-15a. The agreement stated (*id.* at 14a):

> In order to establish a violation of Title 21, United States Code, Section 841(a)(1) as charged in Count 4 of the indictment, the following elements must be established:
>
> 1. That [respondent] distributed one kilogram of cocaine to [Agent] Tapia; and
> 2. That [respondent] did so knowingly and intentionally.

The following section of the agreement, which was entitled "factual basis for plea," detailed the cocaine distributions in which respondent had participated, including the date, place, and terms of the transaction as to which he agreed to plead guilty. *Id.* at 14a-15a.

2. Respondent was rearraigned in accordance with the plea agreement. He waived the reading of the indictment, stating that he had gone over it with his attorney. App., *infra*, 17a-18a. After advising respondent of the rights he would be relinquishing by entering a plea of guilty (*id.* at 18a-21a), the court examined him as follows with respect to the plea agreement (*id.* at 21a-22a):

> The Court: Okay. Mr. Bernal, have you signed the document that we're referring to? * * *
>
> [Respondent]: Yes, Your Honor.
>
> * * * The Court: Now, you have a right to have that document read aloud to you in open court, however you may also give up that right.
>
> [Respondent]: I give up that right.
>
> The Court: Do you have any corrections, counsel or Mr. Bernal, that you wish to make to the factual resume, the plea agreement or the elements of the offense?
>
> * * * Defense counsel: We have no corrections, Your Honor.
>
> The Court: Mr. Bernal, do you agree with that?
>
> [Respondent]: I agree.

Later in the proceeding, the court returned to the plea agreement. After reading the agreement in the court's presence, respondent again attested to the accuracy of the factual summary and testified that he had committed the elements of the offense that the plea agreement described (App., *infra*, 25a-26a):

> The Court: * * * Now, Mr. Bernal, the plea agreement contained the factual resume and elements of the offense. You said you had no corrections to that.
>
> Do you agree that the factual resume is correct?

> [Respondent]: If I could read it again.
>
> The Court: Please take a look at it, because I'm going to ask you whether you committed the elements of the offense with which you are charged.
>
> * * * * *
>
> The Court: All right. Other than that change[1], do you agree that the factual resume is correct?
>
> [Respondent]: Yes, Your Honor.
>
> The Court: Do you admit that you committed the elements of the offense with which you are charged?
>
> [Respondent]: Yes, Your Honor.

Based on those admissions, the court accepted respondent's guilty plea. App., *infra* 27a.[2] After receiving a presentence report, the district court sentenced respondent to 12 years' imprisonment and four years of supervised release. App., *infra*, 2a.

3. The court of appeals reversed the conviction in reliance on *United States* v. *Dayton, supra,* and *United States* v. *Corbett*, 742 F.2d 173 (5th Cir. 1984). In *Dayton*, which was decided before the promulgation of Fed. R. Crim. P. 11(h), the Fifth Circuit held that "a failure by the trial court to address any one or more of [Rule 11's] three core concerns"—absence of coercion, understanding of the accusation, and knowledge of the direct consequences

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[1] After respondent had reviewed the agreement with his lawyer, the lawyer indicated that a single change should be made—substituting "or" for "and" in one place in the document. The change was made, and respondent initialed it. App., *infra*, 25a.

[2] During the course of the plea proceeding, the district court observed that respondent's English was "extremely proficient." App., *infra*, 26a. The presentence report reflected that before his arrest respondent had completed high school and taken courses at a junior college, and that he was employed as a supervisor in a financial services firm. Sentencing Tr. 15.

of the plea—"requires automatic reversal." 604 F.2d at 939. Customary harmless error analysis, *Dayton* continued, was applicable only to "inadequate addresses of these matters," "unrelated constitutional errors arising from Rule 11 proceedings," and violations of those provisions of Rule 11 that first became effective in 1975, after this Court's decision in *McCarthy* v. *United States*, 394 U.S. 459 (1969). 604 F.2d at 939-940. In *United States* v. *Corbett*, 742 F.2d at 178-179 n.14, the Fifth Circuit ruled that Rule 11(h) did not affect the harmless error analysis the court had adopted in *Dayton*.

Applying *Dayton*'s analytical framework to the facts of this case, the court of appeals found that "the district court * * * did not read the indictment or advise the defendant on the record of the nature of the charge to which he sought to plead guilty." App., *infra*, 6a. The panel held that this "complete failure to address a core concern of Rule 11 requires reversal." App., *infra*, 9a.

The court of appeals rejected the government's argument that the error, if any, in respondent's plea proceeding was harmless within the meaning of Rule 11(h). The panel explained that Rule 11(h), " 'as applied to core concerns, is designed to forgive "inadequate addresses," not "entire failures." ' " App., *infra*, 5a (quoting *United States* v. *Corbett*, 742 F.2d at 178-179 n.14). The court acknowledged that "[o]ther circuits have interpreted the effect of subsection (h) differently." App., *infra*, 5a. The court declined to follow the decisions of those other courts, however, because the court viewed *Dayton* and *Corbett* to be "sound" and "binding." App., *infra*, 6a. Similarly, the court observed that "the addition of Rule 11(h) did not require a change" in the circuit's "existing practice in reviewing alleged failures to comply with Rule 11." App., *infra*, 6a.

The government petitioned for rehearing, renewing its argument that any error in respondent's plea proceeding was harmless, and asked the full court to consider the question whether *Dayton* was consistent with Rule 11(h). The panel denied the petition for rehearing in a brief per curiam order. App., *infra*, 11a-12a. The order stated that acceptance of the government's argument "would obliterate" Rule 11(c)(1) and "allow the district judge to sit in his chambers and accept a guilty plea so long as the accused signed papers reflecting his voluntary, knowing agreement to enter the plea." App., *infra*, 12a. The government's suggestion for rehearing en banc was also denied.

REASONS FOR GRANTING THE WRIT

The record of respondent's plea proceeding establishes beyond a shadow of a doubt that he understood the offense to which he was pleading guilty—knowingly and intentionally distributing approximately a kilogram of cocaine to a DEA agent. Nevertheless, the court of appeals reversed respondent's conviction on the strength of *Dayton*'s rule of "automatic reversal." The Fifth Circuit's continued adherence to its *Dayton* framework violates the plain language of Fed. R. Crim. P. 11(h) and the express intent of the drafters of that provision, which was to end the use of the extreme sanction of automatic reversal as a remedy for violations of Rule 11. By refusing to follow the plain language of Rule 11(h), the court of appeals has created a conflict among the circuits concerning the harmless error analysis applicable to violations of Rule 11. The Fifth Circuit's unwillingness to employ conventional harmless error analysis in cases like this one is also contrary to decisions of this Court holding that criminal convictions should not be reversed because of procedural errors that have no effect on defendants' substantial rights.

The issue presented by this case is important to the administration of justice in the federal courts. Of the tens of thousands of federal criminal cases brought each year, more than 85% are resolved through guilty pleas. Experience demonstrates that notwithstanding the diligent efforts of courts and prosecutors to comply with the detailed provisions of Rule 11, errors are bound to occur in some of those cases. The public's "fundamental interest in the finality of guilty pleas," *Hill* v. *Lockhart*, 474 U.S. 52, 58 (1985), and "the prompt administration of justice," *United States* v. *Hasting*, 461 U.S. 499, 509 (1983), require that reversals be reserved for those cases in which an error has had some effect on the voluntariness or accuracy of the defendant's guilty plea.

1. Under its decision in *Dayton*, the Fifth Circuit deems certain violations of Rule 11 to be reversible per se. A "failure by the trial court to address any one or more of [Rule 11's] three core concerns" is presumed to be "inherently prejudicial" and "requires automatic reversal." 604 F.2d at 939; see App., *infra*, 4a. Conventional harmless error analysis is reserved for "inadequate addresses" of those concerns and violations of provisions of Rule 11 that were promulgated after this Court's decision in *McCarthy* v. *United States, supra*. 604 F.2d at 939-940.

As applied to the former category of Rule 11 violations, the Fifth Circuit's approach violates the plain language of Rule 11(h). That provision states that "[a]ny variance" from Rule 11 "which does not affect substantial rights shall be disregarded." That unqualified language does not permit any violation of the rule to be treated as "inherently prejudicial," and it excludes any rule of "automatic reversal." Reversal is permissible only if, based on a review of the record as a whole, an error can be said to have affected a defendant's "substantial rights."

The developments that led up to the promulgation of Rule 11(h) confirm that the provision was intended to have the meaning that its plain language conveys. The express purpose of Rule 11(h) was to do away with automatic reversal rules, like *Dayton*'s, that lower courts had adopted in reliance on this Court's decision in *McCarthy* v. *United States*, 394 U.S. 459 (1969).

In *McCarthy*, the Court construed a relatively simple predecessor of the current version of Rule 11. The trial court had accepted a guilty plea to a charge of tax evasion without personally addressing the defendant as to the elements of that offense, and the record suggested that the defendant had been confused about whether specific intent was required for a conviction. This Court concluded that the plea had been taken in violation of Rule 11's requirement that a trial court "personally inquire whether the defendant understood the nature of the charge." 394 U.S. at 467. The Court also rejected the government's contention that the case should be remanded for further proceedings to determine whether the defendant had actually understood the offense to which he had offered his plea of guilty. The Court explained "that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of the plea." *Id.* at 471-472.[3]

In the decade after *McCarthy*, a number of courts of appeals held that *any* violation of Rule 11 entitled a defendant to reversal of his conviction and an opportunty to re-

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[3] The decision in *McCarthy* was "based solely upon [the Court's] construction of Rule 11 and * * * [its] supervisory power over the lower federal courts." 394 U.S. at 464.

plead.[4] As time passed, however, confusion mounted concerning the appropriate standard of appellate review for violations of Rule 11's increasingly detailed provisions.

In response to that confusion, the Advisory Committee proposed to add Rule 11(h), a specific harmless error provision that would apply to errors in Rule 11 proceedings. This Court promulgated the new provision, 461 U.S. 1117, 1123 (1983), and it became effective on August 1, 1983. The purpose of Rule 11(h) was to eliminate any possible confusion about the applicability of harmless error principles in the guilty plea context, by "mak[ing] clear that the harmless error rule of Rule 52(a) is applicable to Rule 11." Fed. R. Crim. P. 11(h) Advisory Committee note, 18 U.S.C. App. at 987 (Supp IV 1986). The drafters understood that the amendment would supersede *McCarthy*'s suggestion that "prejudice inheres in" a violation of Rule 11. As the Advisory Committee note explained (18 U.S.C. App. at 988):

> Though the *McCarthy* per se rule may have been justified at the time and in the circumstances which obtained when the plea in that case was taken, this is no longer the case.

In the same vein, the drafters emphasized that although Rule 11(h) would not relieve trial courts of the obligation to comply fully with Rule 11, it would "reject[] the extreme sanction of automatic reversal." 18 U.S.C. App. at 989.

Dayton's rule that the failure to address a "core concern" of Rule 11 requires automatic reversal was derived directly from "the *McCarthy* per se rule." See 604 F.2d at 939. Accordingly, whatever merit that rule of automatic reversal may once have had, it should not have

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[4] *E.g.*, *United States* v. *Journet*, 544 F.2d 633, 636 (2d Cir. 1976); *United States* v. *Boone*, 543 F.2d 1090 (4th Cir. 1976); *United States* v. *Fels*, 599 F.2d 142, 148-149 (7th Cir. 1979).

survived the promulgation of an amendment to Rule 11 whose purpose was to end the use of that "extreme sanction." Regardless of the nature of a district court's "variance" from the requirements of Rule 11, a conviction based on a guilty plea may now be reversed only if the error has affected a defendant's "substantial rights."[5]

2. The court of appeals applied the *Dayton* rule of automatic reversal to this case. App., *infra*, 9a. The Eleventh Circuit appears also to continue to adhere to the

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[5] In *United States* v. *Corbett*, 742 F.2d at 178-179 n.14, the Fifth Circuit cited the Advisory Committee's note on proposed Rule 11(h) as support for the proposition that *Dayton* was consistent with the drafters' understanding of Rule 11(h). The note, however, will not bear that construction. Although the Committee cautioned that Rule 11(h) "should *not* be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards," it did not restrict the categories of errors to which harmless error analysis would apply. Thus, the Committee clearly expressed no approval of the continued use of any rule of automatic reversal.

The court of appeals' opinion in this case was also flawed by its failure to distinguish between the effect of holding that a procedure complies with Rule 11 and determining that a procedure, although erroneous, has not affected a particular defendant's substantial rights. A decision that a trial court's error is harmless implies no general approval of the erroneous procedure, and it does not rest on a finding that the same error would be inconsequential in other cases. Contrary to the court of appeals' suggestion (App., *infra*, 8a), therefore, the fact that some defendants may not be able to read English is irrelevant to the question whether the trial court's reliance on respondent's written plea agreement was sufficient in this case to establish respondent's understanding of his offense. Similarly, a finding that any error in the plea proceeding in this case had no effect on any of respondent's substantial rights under Rule 11 would not authorize a district judge to omit any of the elements required by Rule 11 in future cases, let alone "sit in his chambers and accept a guilty plea so long as the accused signed papers reflecting his voluntary, knowing agreement to enter the plea." App., *infra*, 12a.

Dayton framework.[6] Other courts of appeals apply a quite different harmless error analysis to errors that might be reversible under *Dayton*.

The Seventh Circuit has twice held that, when a district court fails to address the defendant concerning the nature of the charges to which a guilty plea is being offered, the omission is harmless error "where it can be said from a review of the proceeding that the defendant nevertheless understood the charges." *United States* v. *Ray*, 828 F.2d 399, 405 (1987), cert. denied, 108 S. Ct. 1233 (1988); *United States* v. *Darling*, 766 F.2d 1095, 1099, cert. denied, 474 U.S. 1024 (1985). In *Ray*, the trial court failed to read the indictment to defendants who were offering guilty pleas to the offenses of conspiracy, mail fraud, and the transmission of altered postal money orders. See 828 F.2d at 406, 408, 411. The Seventh Circuit held that the district court's failure to address the defendants regarding the nature of their offenses was harmless error, since the prosecutor's detailed summaries of the elements of the offenses and the evidence against the defendants, accompanied by the defendants' admissions that those summaries were true, established that the defendants understood the nature of the offenses charged. *Id.* at 406 (conspiracy); *id.* at 408-409 (mail fraud); *id.* at 410-412 (transmission of altered postal money orders).[7]

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[6] In *United States* v. *Bell*, 776 F.2d 965, 968-971 (1985), cert. denied, 477 U.S. 904 (1986), the Eleventh Circuit applied the *Dayton* framework to a trial court's failure to address the defendant regarding the nature of the offense to which a plea was offered. However, the court found that the omission was harmless even under *Dayton*.

[7] The court's analysis of the mail fraud charges against defendant Ray was representative. The court explained (828 F.2d at 408):

> Although the district court failed to comply with Rule 11(c)(1) regarding the mail fraud charges because the court did not discuss the nature of this mail fraud, we again find that the prosecutor's description of the elements of mail fraud coupled with his discus-

Similarly, in *Darling* the defendant agreed to plead guilty to two counts of mail fraud and one count of conspiracy to defraud the IRS. At the plea proceeding, however, the district court "made no attempt to explain the charges" to the defendant. 766 F.2d at 1097. The Seventh Circuit held that the trial court's failure to address the defendant regarding the nature of the offenses violated Rule 11(c)(1). It found that the error was harmless as to the mail fraud counts, however. In reaching that conclusion, the court relied on the prosecutor's description of the evidence as to the mail fraud counts as well as the defendant's admissions. 766 F.2d at 1100. The court reached the opposite conclusion as to the conspiracy count: with respect to that count, the court found "the prosecutor's statement of the factual basis of the conspiracy charge and the court's subsequent colloquy with Darling insufficient evidence that Darling understood the charge." 766 F.2d at 1099.

The First Circuit has taken a similar approach to Rule 11. In *United States* v. *Buckley*, 847 F.2d 991, 1000 n.6 (1st Cir. 1988), cert. denied, 109 S. Ct. 808 (1989), it rejected a claim that a guilty plea was invalid because the district court failed to read the indictment. The court relied on the fact that the defendant had stated that he had discussed the charges with his attorney and understood them; the First Circuit concluded that "[a]ny error made by the district court in failing *personally* to apprise Buckley of the precise nature of the charges against him was * * * harmless." *Ibid.*[8]

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sion of the evidence that would support the charges indicate that Ray nevertheless understood the nature of the mail fraud charges.

[8] Other courts of appeals have found a variety of errors to be harmless. *United States* v. *de le Puente*, 755 F.2d 313, 315 (3d Cir.) (trial court failed to advise defendant that he would not be allowed to withdraw his plea if the court failed to follow a plea agreement's

The harmless error analysis applied in *Ray*, *Darling*, and *Buckley* would compel affirmance of respondent's conviction. The record of the plea proceeding in this case

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recommendation as to the appropriate sentence; "we believe that the omission of the statement required by Rule 11(e)(2) must be deemed harmless error unless there is some realistic likelihood that de le Puente labored under the misapprehension that his plea could be withdrawn"), cert. denied, 474 U.S. 1005 (1985); *United States* v. *Stead*, 746 F.2d 355, 357 (6th Cir. 1984) (trial court failed to advise defendant of this right to confront witnesses and his privilege against compulsory self-incrimination; that omission "constitut[ed] harmless error as no substantial right of the appellant has been violated"), cert. denied, 470 U.S. 1030 (1985); *United States* v. *Kearney*, 750 F.2d 787, 790-791 (9th Cir. 1984) (the magistrate failed to advise defendant of the maximum and minimum penalties for the offense; that error was harmless because the record clearly reflected that the defendant "had actual knowledge of the consequences of his guilty plea" so "his rights cannot be said to have been substantially affected"). None of those cases suggests that there is a class of Rule 11 violations that is immune from conventional harmless error analysis.

Other decisions applying Rule 11(h) to various fact situations include: *United States* v. *Fentress*, 792 F.2d 461, 466 (4th Cir. 1986) (failure to advise defendant of his exposure to a restitution order is harmless error, in view of the fact that the amount of restitution ordered was lower than the maximum fine for the offense, of which the defendant was advised); *United States* v. *Van Buren*, 804 F.2d 888, 891-892 (6th Cir. 1986) (trial court and prosecutor failed to state on the record the nature of the conspiracy to which a guilty plea was to be offered; in view of the complexity of the indictment and the court's failure to inquire into the defendant's understanding, the error could not be considered harmless); *United States* v. *Theron*, 849 F.2d 477 (10th Cir. 1988) (failure to advise defendant that he could not withdraw plea if court failed to follow plea agreement's recommendation as to the appropriate sentence was not harmless error); *United States* v. *McGeehan*, 824 F.2d 677, 680 (8th Cir. 1987) (trial court's understatement of maximum sentence for offense was harmless error in view of fact that sentence imposed was less than that of which the defendant was advised), cert. denied, 108 S. Ct. 1017 (1988); *United States* v. *Sanclemente-Bejarano*, 861 F.2d 206, 210 (9th Cir. 1988) (same).

leaves no doubt that respondent understood the charge to which he was pleading guilty. The offense alleged—knowingly and intentionally distributing a kilogram of cocaine—was one of elementary simplicity. Before he was rearraigned, respondent had gone over the indictment with his attorney. App., *infra*, 17a. See *Henderson* v. *Morgan*, 426 U.S. 637, 647 (1976); *United States* v. *Buckley*, 847 F.2d at 1000 n.6. Respondent's written plea agreement detailed the offense involved and the precise acts that gave rise to the violation. App., *infra*, 14a-15a. During his rearraignment, respondent testified under oath on two occasions that the factual resume was accurate and, immediately after reading the agreement in the district court's presence, admitted that he "committed the elements of the offense with which [he was] charged." App., *infra*, 26a. The record contains no suggestion whatever that respondent had any difficulty reading or understanding the agreement. To the contrary, the court remarked that respondent's English was "extremely proficient." The record also reflects that respondent had completed high school, that he had taken college level courses, and that he worked in a supervisory position at a financial services firm. App., *infra*, 17a; Sentencing Tr. 15. See *United States* v. *Ray*, 848 F.2d at 406. Significantly, respondent did not suggest to the court of appeals that he was confused as to the nature of his offense.[9]

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[9] The court of appeals indicated that Rule 11 would have been satisfied if the district court or the prosecutor had read the indictment in open court and respondent had then been given an opportunity to ask questions about the charge to which his plea was being offered. App., *infra*, 7a. However, the count to which respondent pleaded guilty read, in its entirety, as follows:

Count 4

On or about August 2, 1987, in the Dallas Division of the Northern District of Texas, MARIO BERNAL and MIGUEL

The court of appeals' refusal even to consider whether those facts established respondent's understanding of his offense is squarely in conflict with the decisions of the First and Seventh Circuits in *Buckley, Ray,* and *Darling*. Absent review by this Court, that conflict will undoubtedly persist. The Fifth Circuit has now ruled on two occasions—in *Corbett* and in this case—that *Dayton* survived the promulgation of Rule 11(h). Although it recognizes that *Dayton* is inconsistent with decisions of other courts of appeals, the Fifth Circuit seems determined to adhere to its view. The panel stated that *Dayton* and *Corbett* remain "sound" and "binding," and the full court has declined to address *Dayton*'s inconsistency with Rule 11(h). App., *infra*, 6a. This Court's review is therefore necessary to assure the uniform application of Rule 11(h) in the lower courts.

3. This Court has repeatedly held that "harmless error" provisions must be strictly followed, and it has rejected claims that a variety of procedural errors can be considered inherently prejudicial. See *Bank of Nova Scotia* v. *United States*, 108 S. Ct. 2369 (1988); *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986); *United States* v. *Lane*, 474 U.S. 438 (1986); *United States* v. *Hasting*, 461 U.S. 499 (1983). The court of appeals' decision cannot be reconciled with the reasoning of those cases.

DIMAS, defendants, aided and abetted by each other, knowingly and intentionally did distribute to R. Tapia approximately one kilogram of cocaine, a schedule II narcotic drug controlled substance.

A violation of Title 21, United States Code Section 841(a)(1) and Title 18, United States Code, Section 2.

It is hard to imagine that reading this count would have added anything whatever to respondent's understanding of his offense, since it was virtually identical to the description of the elements of offense in the plea agreement. Respondent specifically admitted committing those elements. See pp. 4-5, *supra*.

In *Lane,* for instance, the Court flatly rejected the notion that any procedural errors can be categorically predetermined to be "prejudicial." Referring to the general harmless error provision in the Federal Rules of Criminal Procedure, the Court stated (474 U.S. at 448 n.11):

> [O]n its face, Rule 52(a) admits of no broad exceptions to its applicability. Any assumption that once a "substantial right" is implicated it is inherently "affected" by any error begs the question raised by Rule 52(a). Assuming there is a "substantial right," the inquiry remains whether the error "affects substantial rights" requiring reversal of a conviction. That kind of inquiry requires a review of the entire record.

By contrast, under *Dayton* the Fifth Circuit will not review "the entire record" to determine whether certain types of Rule 11 violations have affected a defendant's "substantial rights."

The *Dayton* rule imposes the same "societal costs" to which the Court has adverted in decisions upholding the general applicability of harmless error principles. See *United States* v. *Mechanik*, 475 U.S. at 72. When the "automatic reversal" rule of *Dayton* applies, it forces all participants in the criminal justice system to expend time and resources in further proceedings. While in theory reversal only allows the defendant to replead, the "[p]assage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." *Engle* v. *Isaac*, 456 U.S. 107, 127-128 (1982). Even if the government wins a conviction, "the intervening delay may compromise society's 'interest in the prompt administration of justice,' * * * and impede accomplishment of the objectives of deterrence and rehabilitation." *United States* v. *Mechanik*, 475 U.S. at 72 (quoting *United States* v. *Hasting*, 461 U.S. at 509).

These concerns are particularly compelling in the context of a guilty plea. The public has a "fundamental interest in the finality of guilty pleas." *Hill* v. *Lockhart*, 474 U.S. 52, 58 (1985). In almost all cases, a defendant who has pleaded guilty has admitted that he committed the offense charged, and there is rarely any genuine issue that an error has resulted in the punishment of an innocent person. *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979).[10] Before imposing the costs of reversal on the criminal justice system and society at large, the Court's cases emphasize, a court is obligated to determine whether a procedural error has actually prejudiced a criminal defendant. See *Bank of Nova Scotia* v. *United States*, 108 S. Ct. at 2374-2375. The *Dayton* rule is a clear departure from that obligation.

4. The question presented by this case is important to the administration of justice in the federal system. In 1988, the most recent year for which statistics are available, 42,902 defendants were convicted of criminal offenses in the federal courts. Director of the Administrative Office of the United States Courts, *Annual Report* 125 (1988). Of that number, 37,514 (87%) were convicted upon pleas of guilty or nolo contendere.

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[10] In *Timmreck*, the Court quoted with approval a dissent by then-Judge Stevens in *United States* v. *Smith*, 440 F.2d 521, 528-529 (7th Cir. 1971):

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.

A not insignificant percentage of the defendants who plead guilty are disappointed by the sentences they receive and in retrospect regret their decision to forgo a trial. Those same defendants may also calculate, with some justification, that it would be far more difficult for the government to prevail at a trial after lengthy appellate proceedings than it would have been at the point when they offered their pleas. Those defendants have much to gain, and almost nothing to lose, from an appeal from their conviction. The sheer number of guilty pleas received each year makes it inevitable, notwithstanding the best efforts of courts and prosecutors, that deviations from Rule 11's detailed provisions will be found in some of those appeals.

In accordance with its plain language and purpose, Rule 11(h) must be applied so that reversals on appeal from convictions based upon guilty pleas are reserved for those defendants whose pleas can fairly be said to have been tainted by an error on the part of the trial court. Against the background of the tens of thousands of guilty pleas accepted each year in the federal system, this Court's review is appropriate to establish the proper harmless error standard for appeals from convictions based upon guilty pleas, to resolve the conflict among the courts of appeals as to that standard, and to end the use of an analytical framework that undercuts the public's interest in the finality of accurate and voluntary guilty pleas without advancing any of Rule 11's objectives.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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JUNE 1989

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1930
(CR-3-87-209-D)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

MARIO BERNAL, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Texas

(Nov. 25, 1988)

Before GOLDBERG, HIGGINBOTHAM and DAVIS, Circuit Judges.

DAVIS, Circuit Judge:

Appellant Mario Bernal appeals his conviction for distributing cocaine in violation of 21 U.S.C. § 841(a)(1) (1970),[1] to which he pleaded guilty, on grounds that the

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[1] (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; [* * *]

district court failed to comply with Fed. R. Crim. P. 11 (Rule 11). We reverse and remand.

I.

Appellant was indicted on four counts of narcotics violations, including one count of conspiracy to distribute cocaine and three counts of cocaine distribution. In late August 1984, Bernal pleaded not guilty to these charges. But at a rearraignment hearing in October, Bernal entered into a written plea agreement with the government in which he agreed to enter a plea of guilty to one count of cocaine distribution. The district court conducted a Rule 11 proceeding and accepted Bernal's guilty plea. In November, the district court sentenced Bernal to twelve years['] imprisonment, to be followed by four years of supervised release.

After receiving his sentence, Bernal appealed to this court, seeking reversal of his conviction on grounds that the district court did not advise him of the nature of the charges as required by Rule 11(c)(1). This failure, he contends, is fatal to his plea.[2]

Bernal, in the presence of counsel, waived a reading of the indictment near the beginning of his Rule 11 hearing.[3]

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[2] Because of our disposition of this appeal, we need not consider Bernal's additional arguments that he was sentenced to an illegal term of supervised release and the district judge failed to make written findings concerning its ruling on a disputed portion of Bernal's presentence report.

[3] The following colloquy appears in the transcript of the defendant's rearraignment hearing:

> COURT: Mr. Bernal, have you been provided with a copy of the indictment?
>
> DEFENDANT: Yes.

The district court also asked Bernal if he wanted to read the plea agreement which contained the elements of the charged offense. Except for these two exchanges, the district court had no other oral exchange with Bernal concerning the nature of the charges to which Bernal sought to plead guilty. The district judge did, however, have a combined "plea agreement/factual resume" signed by Bernal and his counsel. This instrument recited the elements of the offense and the facts relied upon by the government to support the plea. Bernal waived the reading of this instrument, agreed that the factual resume was correct and that he committed the elements of the offense charged. The district judge verified that Bernal signed this document and permitted him to correct errors in it; however, the district court had no discussion with Bernal about the contents of the document. The question in this appeal narrows to whether the court's failure to have any on-the-record discussion with Bernal about the nature of the charges requires us to reverse this conviction.

COURT: Have you had enough time to go over it with your attorney?

DEFENDANT: Yes, Your Honor.

COURT: Do you desire that the indictment be read aloud to you in open court? You have that right, however, you may also give that right up.

DEFENDANT: No. No, Your Honor.

COURT: All right. By "no," you mean you give up that right?

DEFENDANT: Yes. I don't want it read.

COURT: I am informed that you desire to plead guilty to count 4 of the indictment. Is that correct?

DEFENDANT: That's correct.

II.

"Rule 11 creates a prophylactic scheme designed to insure both that guilty pleas are constitutionally made and that a full record will be available in the event that a challenge is made to the plea." *United States v. Adams*, 634 F.2d 830, 837 (5th Cir. 1981); *United States v. Guichard*, 779 F.2d 1139, 1141 (5th Cir.), *cert. denied*, 475 U.S. 1127 (1986). Rule 11 details both procedural and substantive requirements that must be met before a district court may accept a guilty plea. *Guichard*, 779 F.2d at 1141.

In *United States v. Dayton*, 604 F.2d 931 (5th Cir.), *cert. denied*, 445 U.S. 904 (1974), we held *en banc* that a failure by the district court to address Rule 11's core concerns required automatic reversal. These core concerns are: Was the plea coerced? Does the accused understand the nature of the charges? And does the accused understand the consequences of the plea? In appeals predicated on a failure to comply with Rule 11—other than a failure to address the core concerns—we apply a harmless error analysis. *See also United States v. Corbett*, 742 F.2d 173, 179 n. 14 (5th Cir. 1984). We concluded that reversal was required only when there is an "entire failure" to address one of the three core concerns. But we determined that if the core concerns are met, an "inadequate address" or less than "letter perfect" compliance with Rule 11 may be excused under a harmless error analysis. *United States v. Dayton*, 604 F.2d at 939-40.[4]

The government contends that the addition of Rule 11(h) in 1983 excuses the district court's failure to advise Bernal of the nature of the charges when that omission is

[4] But see the dissent in *Dayton* which points out that most, if not all, of the other circuits required strict compliance with Rule 11. *United States v. Dayton*, 604 F.2d at 948 n. 2 (dissenting opinion).

analyzed under a harmless error analysis. Section (h) provides: "any variance from the procedure required by this rule which does not affect substantive [*sic*] rights shall be disregarded."

United States v. Corbett, 742 F.2d at 179 n. 14, decided shortly after section (h) was added to Rule 11, answers the government's argument. In that case we stated "[w]e are convinced . . . that the addition of section (h) comports with our prior practice." "Clearly, Rule 11(h), as applied to core concerns, is designed to forgive 'inadequate addresses,' not 'entire failures.' " *Id.*

Other circuits have interpreted the effect of subsection (h) differently. The Third and Sixth Circuits have held that Rule 11(h) makes applicable to direct appeals the substantial compliance standard of *United States v. Timmreck*, 441 U.S. 780 (1979). *United States v. de le Puente*, 755 F.2d 313, 315 (3d Cir. 1985); *United States v. Stead*, 746 F.2d 355, 356-57 (6th Cir. 1984). Under *Timmreck*, which until enactment of subsection (h) had governed only those Rule 11 claims brought by way of collateral attack, a guilty plea will be affirmed so long as there was substantial compliance with the rule. On the other hand, the Eleventh Circuit has applied our *Corbett* rule to a Rule 11 claim raised collaterally, while suggesting that a more searching standard of review might apply to direct appeals. *Lilly v. United States*, 792 F.2d 1541, 1545 (11th Cir. 1986). Finally, two circuits, the Seventh and Tenth, have cited both to our *Corbett* rule and to the *Timmreck* rule of the Third and Sixth Circuits, without distinguishing between them. *United States v. Lovett*, 844 F.2d 487, 492 (7th Cir. 1988); *United States v. Theron*, 849 F.2d 477, 480-81 & n. 4 (10th Cir. 1988) (also citing the Eleventh Circuit's *Lilly* decision).

We note these varying interpretations of Rule 11 only to avoid further confusion in this area. They have no effect

upon our decision here. The *Corbett* rule is sound, and it is also binding upon this circuit. It controls our disposition of Bernal's appeal.

III

The district court in this case did not read the indictment or advise the defendant on the record of the nature of the charges to which he sought to plead guilty. This violates the core concern provided by Rule 11(c)(1) which provides:

> (c) Advice to defendant. Before accepting a plea of guilty or nolo contendre, the court must address the defendant personally in open court and inform him of, and determine that he understands . . . the nature of the charge to which the plea is offered, . . .

As stated above, the addition of Rule 11(h) did not require a change in our existing practice in reviewing alleged failures to comply with Rule 11. In *Dayton*, we described in some detail what would satisfy the core concerns addressed by Rule 11(c):

> As for the first clause of the first requirement—that the judge personally inform the defendant of the nature of the charge and determine that he understands it—we are unable to state a simple or mechanical rule but offer some general observation that we hope will be helpful. For simple charges such as those in this case, a reading of the indictment, followed by an opportunity given the defendant to ask questions about it will usually suffice. Charges of a more complex nature, incorporating esoteric terms or concepts unfamiliar to the lay mind, may require more explication. In the case of charges of extreme complexity, an explanation of the elements of the offense like that given the jury in its instructions may be required; this, of course, is the outer limit, for if an

> instruction informs a jury of the nature of the charge sufficiently for it to convict the defendant of it, surely it informs the defendant sufficiently for him to convict himself. We can do no more than commit these matters to the good judgment of the court, to its calculation of the relative difficulty of comprehension of the charges and of the defendant's sophistication and intelligence.

604 F.2d at 937-38; *see also United States v. Punch*, 709 F.2d 889 (5th Cir. 1983).

If the district court had read the indictment to Bernal in open court or directed the Assistant United States Attorney to do so, and then given the defendant an opportunity to ask questions about the charges, this would have been sufficient. This does not mean, however, that reading the indictment is the only way the judge can satisfy his obligation to advise the accused of the nature of the charges. As we stated in *United States v. Punch*, 709 F.2d at 894 n. 6, "[w]here a judge instead explains all of the elements of the offense to the defendant, furnishing him with at least as complete an understanding of the charges as he would obtain from hearing the indictment read, the indictment need not be read as well." As in *Punch,* neither of these procedures was followed in this case. In the exchange between the district court and Bernal, there was not even a cursory reference to the type of offense or the nature of the charges to which Bernal sought to enter a plea.

The government contends that the combined written plea agreement and statement of factual findings which Bernal signed was sufficient to satisfy the judge that Bernal was aware of the nature of the charges pending against him. But more than this is required for the district court to establish on the record the defendant's understanding of

the charges. Even if the defendant purports to silently read the plea agreement in the presence of the court, this is not enough to satisfy the core concern of Rule 11 that the district court personally advise the criminal defendant of the nature of the charge. We cannot assume that all criminal defendants can read English sufficiently to understand the nature of the charge. As we stated in *Dayton*:

> What is necessary is that the trial court, given the nature of the charges and the character and capacities of the defendant, *personally participate* in the colloquy mandated by Rule 11 and satisfy himself fully that, within those limits, the defendant understands what he is admitting and what the consequences of that admission may be, as well as *that what he is admitting constitutes the crime charged*, and that his admission is voluntarily made. (emphasis added).

604 F.2d at 943. *See also United States v. Punch*, 709 F.2d at 894 n.7.

Satisfaction of the core concerns should be established on a verbatim record:

> Finally, a verbatim record of the proceedings must be made, both to preserve them against possible future assertions at variance with them and as a basis for prosecution of untruthful swearing, as well as in order that review of them may be had if desired. In its *McCarthy* opinion, the Court laid great stress on the prophylactic value of such a record:
>
> > [T]he Rule is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination . . .
> >
> > [T]he more meticulously the Rule is adhered to, the more it tends to discourage, or at least to

> enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

Dayton at 438-39, quoting *McCarthy v. United States*, 394 U.S. 459, 465 (1965) (footnote omitted).

The wisdom of *McCarthy*'s policy requiring a verbatim record to reflect satisfaction of Rule 11's core concern is apparent. Reliance on a signed statement, or on a statement which the defendant purports to read to himself in the presence of the district court, to establish that the accused understands the nature of the charges opens the door to later claims by the accused that he did not read or understand what he signed. A remand and further hearings may then be necessary to resolve this contention. If the district court personally addresses the defendant on the record and satisfies himself of the defendant's understanding of the charges, such claims are discouraged and any such claims that are made can be reviewed promptly without additional hearings.

The district court's complete failure to address a core concern of Rule 11 requires reversal. Accordingly, the defendant's conviction is reversed and the case is remanded to the district court to permit defendant to plead anew or for other proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1930
D.C. Docket No. CR-3-87-209-D

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

MARIO BERNAL, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Texas

(Nov. 25, 1988)

Before GOLDBERG, HIGGINBOTHAM and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

November 25, 1988

ISSUED AS MANDATE:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-1930

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

MARIO BERNAL, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of Texas

[Filed Apr. 4, 1989]

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

GOLDBERG, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:

The application for rehearing is denied.

We are persuaded that Rule 11(h) was not intended to nullify important objectives of Rule 11. No objective of Rule 11 is more important than that established in Rule 11(c):

> *(c) Advice to Defendant.* Before accepting a plea of guilty . . . the court must address the defendant

> personally in open court and inform the defendant of, and determine that the defendant understands, the following: (1) the nature of the charge to which the plea is offered . . ."

The court totally failed to address Bernal in open court about the nature of the charge to which he sought to plead guilty. The government contends that we are obliged to excuse this failure because the written instrument Bernal signed included information about the nature of the charge. Acceptance of the government's argument would obliterate Rule 11(c)'s requirement that the court "must address the defendant personally in open court" and determine whether the defendant understands the nature of the charge to which the plea is offered. Such an interpretation of Rule 11 would allow the district judge to sit in his chambers and accept a guilty plea so long as the accused signed papers reflecting his voluntary, knowing agreement to enter the plea.

The Advisory Committee comments to Rule 11(h) caution against such an interpretation: ". . . the Advisory Committee does wish to emphasize two important cautionary notes. The first is that subdivision (h) should *not* be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards" (emphasis in original).

In sum, the addition of subsection (h) to Rule 11 was not intended to allow district courts to ignore Rule 11(c)'s command that they personally address the accused about the nature of the charges to which a plea is offered and in that open court exchange satisfy themselves that the defendant understands those charges.

DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Criminal No. 3-87-209-D

UNITED STATES OF AMERICA

v.

MARIO BERNAL

PLEA AGREEMENT

[Filed Oct. 9, 1987]

The government and Defendant MARIO BERNAL present this plea agreement to the Court for its consideration pursuant to Rule 11(e)(1)(C). The agreement reached by the parties is as follows:

1. The defendant agrees to enter a plea of guilty to Count 4 of the indictment.

2. The parties agree that the maximum term of incarceration which the defendant can receive for his plea of guilty is fifteen (15) years in the custody of the Attorney General without eligibility for parole. No agreement is made as to any fine the Court may impose. The defendant will, however, be required to pay a mandatory special assessment of $50.

3. The government will move for the dismissal of Counts 1 through 3 of the indictment, as they pertain to this defendant only, at the conclusion of his sentencing on Count 4.

4. The defendant agrees to furnish truthful information and testimony concerning all federal and state criminal violations of which he has knowledge. The defendant further agrees to submit to polygraph examination if requested by the government.

5. Should the defendant refuse to testify or should he at any time testify untruthfully, then this entire agreement will become null and void and all charges contained in the indictment will be automatically reinstated.

6. There are no promises, agreements or representations, either expressed or implied, between the parties hereto other than those set forth above.

ELEMENTS AND FACTUAL BASIS

A. *Essential Elements*

In order to establish a violation of Title 21, United States Code, Section 841(a)(1) as charged in Count 4 of the indictment, the following elements must be established:

1. That the defendant distributed one kilogram of cocaine to R. Tapia; and
2. That the defendant did so knowingly and intentionally.

B. *Factual Basis for Plea*

From early July 1987 through August 2, 1987, Defendant MARIO BERNAL ~~and~~ or [HSW Jr., MB, WW] his co-defendant, Miguel Dimas, negotiated with Ramona Tapia, an undercover agent for the U.S. Drug Enforcement Administration, to sell and distribute cocaine in

large quantities to Ms. Tapia. Defendants BERNAL and Dimas actually delivered a total of approximately two and one-fourth (2¼) kilograms to Ms. Tapia during this period of time.

The last such delivery occurred on August 2, 1987 at the Radisson Hotel at Northwest Highway and Stemmons Freeway in Dallas, Dallas County, Texas. On this day, Defendants BERNAL and Dimas knowingly and intentionally delivered to Ms. Tapia approximately one kilogram of cocaine, a Schedule II narcotic drug controlled substance. The defendants were supposed to have been paid $30,000 for his kilogram, but they were arrested by DEA agents immediately after they delivered the cocaine to Ms. Tapia.

The above facts are true and correct this ~~28th~~ 9th [HSW Jr., MB, WW] day of ~~August~~ October [HSW Jr., MB, WW], 1987.

Respectfully submitted,

MARVIN COLLINS
United States Attorney

/s/ Wm. Kim Wade
WM. KIM WADE
Assistant United States Attorney
1100 Commerce, Room 16G28
Dallas, Texas 75242
(214) 767-0951

/s/ Mario Bernal
MARIO BERNAL
Defendant

/s/ Hal Wallace
HAL WALLACE
Attorney for Defendant

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CR3-87-209-D

UNITED STATES OF AMERICA,

versus

MARIO A. BERNAL

Dallas, Texas
October 9, 1987
9:00 O'Clock a.m.

ARRAIGNMENT TRANSCRIPT

Before the Honorable Judge SIDNEY A. FITZWATER

(Call to Order of the Court)

THE COURT: United States versus Mario Bernal.

Mr. Wallace, will the presentence report reflect that this is a first or subsequent drug-related offense?

MR. WALLACE: First offense ever, Your Honor.

THE COURT: All right. I'm going to give him the warnings then for a first offense.

In addition, as with one of the other persons charged with Mr. Bernal whom I sentenced the other day, I'm going to conditionally accept the plea agreement based on a review of the presentence report as with the other co-defendant.

If I find that the presentence report verifies what you say with respect to a first offense and no other report,

then in all likelihood I would accept the plea agreement.

Mr. Reeves, will the plea agreement reflect a cap?

MR. REEVES: Yes, it will, Your Honor.

THE COURT: That was similar to the co-defendant. So I will be conditionally accepting the plea, subject to reviewing and making sure the 15-year cap will be appropriate. Do you understand that?

MR. WALLACE: Yes, Your Honor, I do.

THE COURT: Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. You are Mario Bernal; is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mario is M. A. R. I. O.?

THE DEFENDANT: Yes.

THE COURT: Bernal, B. E. R. N. A. L.?

THE DEFENDANT: Yes.

THE COURT: Do you have a middle name?

THE DEFENDANT: Yes, sir. Albert—Alberto.

THE COURT: A. L. B. E. R. T. O.?

THE DEFENDANT. Yes.

THE COURT: How old are you, Mr. Bernal?

THE DEFENDANT: 25 years old.

THE COURT: How far did you go in school?

THE DEFENDANT: I finished high school and took one year of college.

THE COURT: Mr. Bernal, have you been provided with a copy of the indictment?

THE DEFENDANT: Yes.

THE COURT: Have you had enough time to go over it with your attorney?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you desire that the indictment be read aloud to you in open court? You have that right, however, you may also give that right up.

THE DEFENDANT: No. No. Your Honor.

THE COURT: All right. By "no," you mean you give up that right?

THE DEFENDANT: Yes. I don't want it read.

THE COURT: I am informed that you desire to plead guilty to count 4 of the indictment. Is that correct?

THE DEFENDANT: That's correct.

THE COURT: Before accepting your plea there are a number of questions I will ask you to make sure that it is a valid plea. If you don't understand any of my questions will you stop me and tell me you don't understand?

THE DEFENDANT: Yes.

THE COURT: If I go too fast will you ask me to repeat?

THE DEFENDANT: Yes.

THE COURT: You have a right to consult with Mr. Wallace your attorney at any time during the proceeding. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: If at any time you wish to consult with him, if you will simply ask me to stop, I'll give you as much time as you need to consult with him.

THE DEFENDANT: All right.

THE COURT: The clerk will please swear Mr. Bernal.

MARIO BERNAL, DEFENDANT, SWORN

THE COURT: I intend to ask you under oath on the record and in the presence of your counsel about the offense to which you are about to plead.

Do you understand that having been sworn if in answer to my questions you do not answer truthfully your answers may later be used against you in a prosecution for perjury or for making a false statement?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Within the last 24-hours have you taken any drugs, medicine or pills or drunk any alcoholic beverages?

THE DEFENDANT: No, Your Honor.

THE COURT: Mr. Wallace, do you have any doubt regarding the competence of Mr. Bernal to enter a guilty plea today?

MR. WALLACE: None whatsoever.

THE COURT: Mr. Reeves, do you have any doubt?

MR. REEVES: No, sir.

THE COURT: All right. I find you competent, Mr. Bernal, to plead to the indictment by which you are charged.

Have you had enough time to discuss your case with your attorney?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with his representation of you?

THE DEFENDANT: Yes.

THE COURT: Do you understand that under the Constitution and laws of the United States you have the right to plead not guilty and you are entitled to a trial by a jury on the charges contained in the indictment?

THE DEFENDANT: Yes.

THE COURT: Now, I believe previously I arraigned you and entered a not guilty plea on your behalf. Is that correct?

MR. WALLACE: That's correct, Your Honor.

THE COURT: All right. You were here once before?

THE DEFENDANT: Yes. Yes, that's correct.

THE COURT: Okay. Do you understand that you're under no obligation to change your plea from not guilty to guilty? You don't have to do this.

THE DEFENDANT: Okay.

THE COURT: Do you understand?

THE DEFENDANT: Yes, I understand.

THE COURT: And is it your own free choice and free will to change your plea from not guilty to guilty to count 4.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand that at the trial on count 4, if you chose to go to trial: You would have the right to the assistance of a lawyer; you would be presumed to be innocent; and the government would be required to prove you guilty by competent evidence and beyond a reasonable doubt before you could be found guilty; and you would not be obligated to prove that you were innocent?

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand that in the course of trial the witnesses for the government would have to come to court and testify in your presence and you would have the right to confront and cross-examine the witnesses for the government, object to evidence offered by the government, and offer evidence on your own behalf?

THE DEFENDANT: Yes.

THE COURT: Do you understand also that at a trial while you would have the right to testify if you chose to do so, you also would have the right not to testify and could not be compelled to incriminate yourself and no inference or suggestion of guilt could be drawn from the fact that you did not testify?

THE DEFENDANT: Yes.

THE COURT: If you plead guilty and I accept your plea, do you understand that you will waive your right to a trial, and the other rights I have just discussed with you, there will be no trial and I will enter a judgment of guilty and sentence you on the basis of your guilty plea after considering a presentence report?

THE DEFENDANT: Yes.

THE COURT: If you plead guilty do you understand you will also have to waive your right not to incriminate yourself since I will ask you questions about what you did in order to satisfy myself that you are guilty as charged and you will have to admit that you're guilty?

THE DEFENDANT: Yes.

THE COURT: Having discussed your rights with you, do you still want to plead guilty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has anyone threatened you or anyone else or forced you in in [*sic*] any way to plead guilty?

THE DEFENDANT: No, Your Honor.

THE COURT: Have you discussed your willingness to plead guilty with Mr. Wallace?

THE DEFENDANT: Yes.

THE COURT: Has he in turn discussed it with the government resulting in the plea agreement with the 15-year cap?

THE DEFENDANT: I figure so.

THE COURT: All right.

THE DEFENDANT: Yes.

THE COURT: Is your willingness to plead guilty the result of these discussions?

THE DEFENDANT: Yes.

THE COURT: Has there been a plea agreement signed, Mr. Reeves?

MR. REEVES: There has been, Your Honor.

THE COURT: All right. Is the plea agreement a separate document from the factual resume?

MR. REEVES: No, Your Honor. A single document containing both the plea agreement and the elements of the offense and the factual resume.

THE COURT: Okay. Mr. Bernal, have you signed the document that we're referring to?

MR. REEVES: Yes.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you, Mr. Wallace?

MR. WALLACE: Yes, Your Honor.

THE COURT: Now, you have a right to have that document read aloud to you in open court, however you may also give up that right.

THE DEFENDANT: I give up the right.

THE COURT: Do you have any corrections, counsel or Mr. Bernal, that you wish to make to the factual resume, the plea agreement or the elements of the offense?

MR. REEVES: The government has none, Your Honor.

MR. WALLACE: We have no corrections, Your Honor.

THE COURT: Mr. Bernal, do you agree with that?

THE DEFENDANT: I agree.

MR. REEVES: I point out, Your Honor, that the date has been corrected from August 27 or August 28 to the 19th.

THE COURT: Has that change been initialed?

MR. WALLACE: No, Your Honor.

THE COURT: Before you file it if you would get counsel and Mr. Bernal to initial it. And then it may be filed with the clerk.

MR. REEVES: May I approach to file with the clerk?

THE COURT: You may.

THE COURT: Mr. Bernal, other than the plea agreement, has any promise been made to you to induce you to plead guilty?

THE DEFENDANT: No, Your Honor.

THE COURT: Has anyone made any prediction, prophesy or promise to you as to what your sentence will be, other than that if I accept it it would not exceed 15 years without parole?

THE WITNESS: No.

THE COURT: Do you understand that I, and I alone, will decide what your sentence will be ranging between the minimum of five years without parole to fifteen years without parole?

THE DEFENDANT: Yes.

THE COURT: All right.

THE COURT: If I accept the plea agreement do you understand that the maximum possible penalty under count 4 will be 15 years[']imprisonment without parole, plus four years of supervised release, plus a fine of up to $2 million or the larger, double the gross pecuniary gain derived by you from the offense or double the gross pecuniary loss caused by the offense to another person; and in addition you may be ordered to make restitution in the form of money or services in lieu of money to the victim of the offense or make restitution to a person or organization designated by the victim or the victim's estate; and in addition you will be required to pay a mandatory special assessment of $50?

THE DEFENDANT: Yes, I understand.

THE COURT: Do you understand that a period of supervised release is a special period of parole supervision that follows the termination of supervision under the regular sentence. It is separate from a regular sentence to begin immediately upon termination of supervision or upon release without supervision?

THE DEFENDANT: Yes, I understand.

THE COURT: Do you understand that the minimum sentence in this case by law must be a period of 5 years[']imprisonment without parole, plus four years of supervised release?

THE DEFENDANT: I understand.

THE COURT: All right. Do you understand that any term of imprisonment that I impose or any fine that I im-

pose as to count 4 is only for count 4 and not for some other offense that I'm unaware of?

THE DEFENDANT: Yes, I understand.

THE COURT: Having been informed of your rights and of the possible consequences of pleading guilty, how do you plead to count 4 of the indictment, guilty or not guilty?

THE DEFENDANT: I plead guilty.

THE COURT: As I have indicated at the outset of the proceeding, I'm not prepared at this time to accept or reject the plea agreement but I will defer until I have an opportunity to consider the presentence report. And I will refer the matter to the probation officer for consideration and recommendation.

In this connection you may, Mr. Bernal, with your written consent be interviewed by a probation officer. And the court may inspect the presentence report for the purpose of determining whether to accept or reject the plea agreement.

Are you willing to execute the written consent form to be interviewed by the probation officer and have me view the presentence report prior to determining whether or not to accept the plea agreement?

THE DEFENDANT: Yes.

THE COURT: All right. That being the case, then I will defer my decision until I have read the presentence report.

The way this normally works, Mr. Bernal and Mr. Wallace, is that the presentence report is available on the Tuesday prior to sentencing. In this case I'm going to be setting sentencing for Friday November 20, 1987 at 9:00 a.m., so the presentence report would be available on Tuesday, November 17, 1987.

On that date I review the presentence report and if I determine to accept the plea I issue an order and have the

courtroom deputy call the government and defense counsel and indicate that the sentencing will go forward on that following Friday.

Let me say this, if the report reflects what you represent to me this morning, that this is a first offense and no prior related offenses, I can tell you that I'm probably going to accept the 15-year cap.

MR. WALLACE: Judge, I can assure the court this—well, from the records, computer records that I have been able to check, this young man has never—this is the first time he's ever been arrested.

THE COURT: Okay. Well, because I know that you and your family care about this and what is going to happen, if that's true in all likelihood I'm going to accept the cap. But I do want to make sure, because sometimes things are found in the presentence process.

Now, if for some reason I don't accept the cap, I will allow Mr. Bernal to withdraw his plea of guilty if he so chooses.

All right. Now, Mr. Bernal, the plea agreement contained the factual resume and elements of the offense. You said you had no corrections to that.

Do you agree that the factual resume is correct?

THE DEFENDANT: If I could read it again.

THE COURT: Please take a look at it, because I'm going to ask you whether you committed the elements of the offense with which you are charged.

MR. WALLACE: Judge, there is one correction that we would make by changing one word. On page 2 under the factual basis, the first sentence, second line, where it says "defendant Mario Bernal and his co-defendant," and if we can change that "and" to an "or" that's the only correction or change he would like to make.

THE COURT: Does the government object to that?

MR. REEVES: No, sir.

THE COURT: I'm going to return the document and ask that that change be made and initialed by all three of you.

MR. REEVES: May I approach?

THE COURT: You may.

MR. REEVES: May I hand it up?

THE COURT: You may.

THE COURT: All right. Other than that change, do you agree that the factual resume is correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you admit that you committed the elements of the offense with which you are charged?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Also, Mr. Bernal, the Magistrate on August 7, 1987, in his order, indicates that you are a citizen of Mexico, but legally within the United States. Is that correct?

THE DEFENDANT: That's right. That's correct, Your Honor.

THE COURT: Okay. Do you understand that by pleading guilty that that could effect your right to remain in the United States?

THE DEFENDANT: Yes.

THE COURT: Okay. Understanding that that's true, do you nevertheless desire to plead guilty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay.

MR. WALLACE: Your Honor, he's been here 4 years legally and just never applied for U.S. citizenship.

THE COURT: Had that not been in the Magistrate's report—first of all, I'm not going to assume that every Hispanic person that comes before me is not an American citizen. And number two, his English is extremely proficient and were it not in the report I would not have known that, but I think he's entitled to that warning under law.

MR. WALLACE: Okay. Fine.

THE COURT: Based upon the defendant's admission that the factual resume is correct and that he committed the elements of the offense with which he is charged, I find that the defendant's plea of guilty to count 4 of the indictment is supported by the facts.

I further find, conclude, and adjudge that the defendant is guilty of the offense charged in count 4 of the indictment.

I set sentencing in this case for Friday November 20, 1987 at 9:00 o'clock a.m.

A presentence report will be prepared and will be available on Tuesday November 17, 1987.

As I previously indicated, I am not prepared to accept or reject the plea agreement, but Mr. Bernal has indicated his willingness to sign a written consent to provide information to the probation officer. Accordingly, Mr. Bernal, you will need to give that information to the probation officer. Your attorney may be present with you at that time, if you wish.

It is in your best interest to cooperate with the probation officer, since the presentence report will be important in my decision, both with respect to whether to accept the plea agreement and as to the sentence to be imposed.

You and your attorney will be afforded the opportunity to speak on your behalf at the sentencing hearing. As many people as you wish may write letters to me. I will read all of those letters. But at the sentencing hearing in the interest of judicial economy I will hear from a maximum of you and your attorney and up to three other persons on your behalf.

I'm going to remand you to the custody of the United States Marshall at this time.

The probation officer will want to visit with you a couple of minutes to get the presentence report process initiated.

THE DEFENDANT: I would like to ask you a question.

THE COURT: You may.

THE DEFENDANT: You said persons can write letters, would that be directly to you?

THE COURT: Normally those are sent to the probation officer and in turn to me.

I also receive letters directly. Either way they will get to me. The reason it is sometimes helpful to give them to the probation officer is that the probation officer will have the benefit of those letters. But they can be sent directly to me and I will review it.

THE DEFENDANT: Okay. Thank you.

THE COURT: Okay. You are remanded at this time.

Mr. Wallace, if you have nothing further you are excused.

Does the government have anything further?

MR. REEVES: Nothing, Your Honor. Thank you.

THE COURT: There being nothing further, then we'll stand in recess.

(END OF PROCEEDINGS)

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No. 88-1942

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

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UNITED STATES OF AMERICA,

PETITIONER

V.

MARIO BERNAL,

RESPONDENT

On Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN FORMA PAUPERIS

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit applies a harmless error analysis in reviewing challenges to guilty pleas entered under Fed. R. Civ. P. 11.

2. Whether the United States Court of Appeals for the Fifth Circuit properly reversed Appellant's conviction when the District Court totally failed to comply with Fed. R. Crim. P. 11(c)(1)'s requirement that the Court personally address the defendant, inform him of, and determine that he understands the nature of the offense, and committed other harmful errors.

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No. 88-1492

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

UNITED STATES OF AMERICA,

PETITIONER

V.

MARIO BERNAL,

RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Mario Bernal, proceeding in forma pauperis, respectfully files this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit that the Solicitor General, on behalf of the United States of America, has filed to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

I.

REPLY TO PETITIONER'S STATEMENT OF THE CASE

On August 2, 1987, Drug Enforcement Agency personnel arrested Respondent Bernal, and Miguel Dimas immediately after they allegedly delivered approximately one kilogram of cocaine to Ramona Tapia, a government undercover agent. (Plea Agreement of October 9, 1987. Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (the "Petition") at 13a.) Hal D. Wallace, Jr. entered his appearance as retained counsel for Respondent Bernal on August 6, 1987. The United States District Court for the Northern District of Texas, Dallas Division arraigned Respondent Bernal on August 28, 1987, and he entered a plea of not guilty. At a rearraignment hearing on October 9, 1987, Respondent Bernal proposed to change his plea pursuant to a negotiated plea agreement.[1] At that time, the District Court did not read the indictment to Respondent Bernal. After prompting by the District Court, Mr. Bernal made the unsworn statement that he did not desire to have the indictment read. (Petition at 17a - 18a.) The District Court then administered an oath and asked a number of questions concerning Respondent's desire to plead guilty, and his understanding of the plea's consequences pursuant to Fed. R. Crim. P. 11.

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[1] As detailed later all involved parties including the Court misapprehended the appropriate range of punishment because they failed to realize that the statutory amendment increasing the range of punishment had not taken effect. That error independently tainted the entire Rule 11 proceeding. See Section II B, infra.

Respondent Bernal stated he gave up the right to have the plea agreement itself read in open court. (Petition at 22a.) He also stated that there were no corrections to the factual resume, the plea agreement, or the elements of the offense. (Id. at 22a.) During this interchange, the Court gave erroneous advice on the range of punishment. At the conclusion of the Rule 11 examination, Respondent Bernal pled guilty to Count IV of the indictment. The Court deferred acceptance of the plea agreement pending consideration of the presentence report, and set sentencing for November 20, 1987. Respondent Bernal, and his lawyer then did make two nonsubstantive changes to the factual resume without government objection. (Id. 14a - 15a, 25a - 26a.)

By order filed November 17, 1987, the District Court accepted the guilty plea to Count IV, and reaffirmed the November 20, 1987 setting. The Court noted 18 U.S.C. §3552(d)'s effective date of November 1, 1987, and its provision for a ten day review period. Respondent Bernal, and his retained counsel signed and filed a waiver of the ten day examination period. The Court then proceeded with the sentencing hearing on November 20, 1987. Assuming that the statutory amendment increasing the range of punishment for the offense charged in Count IV applied, it imposed a 12 year nonparolable sentence, and dismissed Counts I, II, and III of the indictment.

On November 25, 1988, the United States Court of Appeals for the Fifth Circuit reversed Respondent's conviction and remanded the case to the District Court for a new plea, or further proceedings. (Petition at 1a) United States v. Bernal, 861 F.2d

434 (5th Cir. 1988). (Petition at 1a) On January 18, 1989, United States filed a Petition for Rehearing, and a separate suggestion for rehearing en banc. On April 4, 1989, the Court of Appeals denied the government's petition for rehearing, and suggestion for rehearing en banc. United States v. Bernal, 871 F.2d 490 (5th Cir. 1989). (Petition at 11a)

II.

ARGUMENT

A. THE FIFTH COURT DOES APPLY A PROPER HARMLESS ERROR ANALYSIS IN REVIEWING CHALLENGES TO GUILTY PLEAS ENTERED UNDER FED. R. CRIM. P. 11.

The Government incorrectly asserts that the Fifth Circuit applies an improper "automatic reversal" standard when reviewing challenges to guilty pleas under Fed. R. Crim. P. 11. It argues that the standard of review enunciated in United States v. Dayton, 604 F.2d 931 (5th Cir. 1979)(en banc), cert. denied, 445 U.S. 904 (1980) as reaffirmed in United States v. Corbett, 742 F.2d 173 (5th Cir. 1984) fails to give effect to the 1983 amendment that added a harmless error subsection to Fed. F. Crim. P. 11.

The Government in fact misanalyzes the Fifth Circuit's analytical framework as established in Dayton, and incorrectly asserts that it conflicts with the approach in other circuits. In Corbett the Fifth Circuit specifically considered the effect of the 1983 addition of subsection (h) and concluded that under Dayton the Fifth Circuit was already following a harmless error analysis in direct appeals asserting Rule 11 violations. The Corbett court stated "We are convinced, however, that the addition of section (h) comports with our prior practice." 742 F.2d at 179, n. 14. The Fifth Circuit here noted this precedent and correctly proceeded to follow and apply Dayton, Corbett, and Fed. R. Crim. P. 11. 861 F.2d at 436-37. (Petition at 4a-6a)

The Government seizes upon one paragraph of the Fifth Circuit's opinion to argue that the rule enunciated in Dayton, and reaffirmed

in Corbett, is contrary to the practice in other circuits. The opening sentence of that paragraph does state: "Other circuits have interpreted the effect of Subsection (h) differently." 861 F.2d at 436. (Petition at 5a) In the review that follows, however, the opinion fails to identify any conflict between Dayton and the cited cases from other circuits. The cited opinions from other circuits that reference Fifth Circuit cases all interpret the Fifth Circuit approach as a "harmless error" analysis. See United States v. Theron, 869 F.2d 477, 479-80 n. 3, 4 (10th Cir. 1988); United States v. Lovett 844 F.2d 487, 492 (7th Cir. 1988); Lilly v. United States, 792 F.2d 1541, 1545-46 (11th Cir. 1986). Shepardization of the Dayton and Corbett opinion reveals that no other circuit has explicitly criticized or refused to follow the Dayton and Corbett approach.

The Government asserts that the Eleventh Circuit also follows Dayton and refuses to apply the harmless error analysis for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. (Petition at 11-12) Yet it cites United States v. Bell, 776 F.2d 965 (11th Cir. 1985), cert. denied, 477 U.S. 904 (1986) in a footnote and concedes that the Eleventh Circuit did find the error in question harmless. (Petition at 12 n. 6)

The Bell opinion reflects a much more extensive record that exists here. There, the Government presented a detailed, on the record, factual recitation of the basis for the charge in Bell's presence. 776 F.2d at 969-70. The opinion further notes:

> Thereafter, in commenting upon Agent Collins' recitation of the facts, Bell's attorney stated:

> I believe that recitation is exactly what the Government would offer as proof in this case, that it would support a conviction for conspiracy to import marijuana and a conviction for conspiracy to possess marijuana with the intent to distribute it, and we have no evidence to offer contrary to the proper testimony by the Government.
>
> The district court then accepted Bell's guilty plea.

776 F.2d at 970.

The Advisory Committee note to Fed. R. Crim. P. 11 actually confirms the continued validity of the Fifth Circuit's Dayton analysis. The 1983 amendment note on prior practice discusses a conflict among the circuits over the validity of "harmless error" analysis on direct appeals asserting Rule 11 violations. The Advisory Committee note cites United States v. Journet, 544 F.2d 633 (2nd Cir. 1976), and United States v. Boone, 543 F.2d 1090 (4th Cir. 1976) as examples of decisions rejecting the harmless error concept in direct Rule 11 appeals. It then states:

> On the other hand, decisions are to be found taking a harmless error approach on direct appeal where it appeared the nature and extent of the deviation from Rule 11 was such that it could not have had any impact on the defendant's decision to plead or the fairness in now holding him to his plea.

See 18 U.S.C.A. Vol. 13 at 361. To support that statement, the Advisory Committee then specifically cites the Fifth Circuit decision in United States v. Coronado, 554 F.2d 166 (5th Cir.), cert. denied, 454 U.S. 870 (1977) (affirming a guilty plea conviction despite the district court's failure personally to explain the charges because the transcript affirmatively

demonstrated sufficient explication). The later Dayton decision reaffirmed the standard the Coronado court applied. Thus, contrary to the Government's assertions, the addition of Subsection (h) in the 1983 Amendment to Fed. R. Crim. P. 11 was intended to affirm, not reject, the Dayton approach.

The Advisory Committee note on the 1983 Amendment further states:

> Although all of the aforementioned considerations support the policy expressed in new subdivision (h), the Advisory Committee does wish to emphasize two important cautionary notes. The first is that subdivision (h) should not be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards. There would not be harmless error under subdivision (h) where, for example, as in McCarthy there had been absolutely no inquiry by the judge into defendant's understanding the nature of the charge and the harmless error claim of the Government rests upon nothing more than the assertion that it may be "assumed" defendant possessed such understanding merely because he expressed the desire to plead guilty.

18 U.S.C.A. Vol. 13 at 363. Thus, the Advisory Committee expressly adopted the Dayton analysis that a total failure to address a core concern of Rule 11 is harmful. That is not a rejection of harmless error analysis, but a proper application of it.

The Advisory Committee went on to say:

> Indeed, it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited, as in such instances the matter "must be resolved solely on the basis of the Rule 11 transcript" and the other portions (e.g., sentencing hearing) of the limited record made in such cases. United States v. Coronado, supra. Illustrative are: where the judge's compliance with subdivision (c)(1) was not absolutely complete, in that

> some essential element of the crime was not mentioned, but the defendant's responses clearly indicate his awareness of that element . . .

Id. Again, this is illustrative of the situation where the trial judge inadequately addresses a core concern, but no harm occurs. The substance of the Advisory Committee's analysis is identical to the Dayton standard.

In Section II of its opinion, the Fifth Circuit carefully and correctly defined the applicable standard of review set forth in United States v. Dayton, 604 F.2d 931 (5th Cir.)(en banc), cert. denied, 445 U.S. 904 (1974). The Government argues strenuously that the Fifth Circuit follows an inflexible and artificial standard. The actual opinion below belies that implication. So does the text of the Dayton opinion. The Government has manufactured an illusory conflict among the circuits to justify review in this court, when its true complaint is over the application of the correct standard to the specific case.

B. THE FIFTH CIRCUIT PROPERLY REVERSED RESPONDENT'S CONVICTION BECAUSE THE DISTRICT COURT TOTALLY FAILED TO COMPLY WITH FED. R. CRIM. P. 11 (c)(1), AND COMMITTED OTHER HARMFUL ERRORS.

Not only did the Fifth Circuit articulate the correct test, it correctly applied it to the facts of this case. The court below noted the express language of Fed. R. Crim. P. 11(c)(1) that specifically requires that: "Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands . . . the nature of the charge to which the plea is offered ...." Fed. R. Crim. P. 11(c)(1) (emphasis supplied).

The Fifth Circuit correctly held that the appellate record is entirely devoid of any evidence that the trial court did so in this case, and devoid of any record evidence that the equivalent advice was provided. It is undisputed that the trial court did not read the indictment or the plea agreement to Respondent Bernal. In fact, the trial court prompted Respondent to waive reading of the indictment, and accepted his waiver of the reading of the plea agreement. Merely reading the indictment and asking whether the defendant has discussed the charge with his attorney is insufficient. Majko v. United States, 457 F.2d 790 (7th Cir. 1972). See also, United States v. Punch, 709 F.2d 889 (5th Cir. 1983). Suggesting waiver of a reading of the indictment, and asking about discussions with an attorney then recently arrested and now suspended from the practice of law for drug violations is totally inadequate.[2]

The Fifth Circuit carefully reviewed the record and concluded: "In the exchange between the district court and Bernal, there was not even a cursory reference to the type of offense or the nature of the charges to which Bernal sought to enter a plea." 861 F.2d at 437. (Petition at 2a). The above errors in the Rule 11 proceeding are clearly sufficient to require reversal.

In this case, however, the record reflects additional harmful errors. After implicitly coercing Respondent Bernal to waive the

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[2]The 199th Judicial District court of Collin County, Texas recently suspended Respondent's retained counsel from the practice of law pending his appeal from his conviction of unlawful possession with intent to deliver cocaine. He was arrested on that charge shortly before Respondent's sentencing hearing. 1988 Tex. B. J. 1139-40.

reading of the indictment, and failing to deliver any advice as to the nature of the charge, the court then erroneously informed Bernal that the maximum period of "supervised release" was four years, instead of life. See United States v. Molina-Uribe, 853 F.2d 1193 (5th Cir. 1988)(reversing a guilty plea conviction for the trial judge's failure to advise the defendant of the maximum possible post-incarceration special parole period). Further, the court gave only a cursory and inadequate explanation of the term "supervised release".

The Government relies upon speculation, rather than record evidence, in arguing that Respondent's presumed ability to read and absorb the information contained in the plea agreement excuses the District Court's admitted error. The fact that Respondent's counsel changed an "and" to an "or" in the plea agreement is just as consistent with substantive ignorance as with comprehension. At no time did anyone read any portion of the indictment or the factual resume, or make any specific statements concerning the nature and elements of the offense charged in Respondent's presence.

More significantly the District Court, and the parties negotiating the plea agreement, totally misapprehended the applicable penalty provisions. The section amending 21 U.S.C. § 841 that increased the penalty for the offense charged in Count IV is only effective for offenses committed after November 1, 1987. See United States v. De Los Reyes, 842 F.2d 755 (5th Cir. 1988); United States v. Byrd, 837 F.2d 179 (5th Cir. 1988). Thus, Respondent's retained counsel, the United States Attorney, and the

District Court at the Rule 11 hearing affirmatively misled Respondent Bernal concerning the potential punishments, and exaggerated the benefits of the plea agreement. In Kennedy v. Maggio, 725 F.2d 269 (5th Cir. 1984), the Fifth Circuit aptly stated: "It is elementary that a plea entered in reliance on defendant's attorney's patently erroneous statement of the law in relation to the facts cannot be voluntary due to the attorney's ineffectiveness." 725 F.2d at 273. Where the District Court, and the Government affirmatively contributed to Respondent's fundamental misunderstanding, the situation is even more egregious. That error alone compels reversal.

The Government has totally failed to demonstrate that the Fifth Circuit applies a different standard of review than any other circuit, or that the Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's power of supervision." See U.S. Sup. Ct. R. 17.1(a). Undoubtedly federal courts dispose a very high percentage of a very large number of criminal cases through guilty pleas under Fed. R. Civ. P. 11. The paucity of citations in the Government's Petition to Fifth Circuit guilty plea reversals graphically demonstrates that in almost ten years of application the Fifth Circuit has not used Dayton to reverse an inordinate number of guilty plea convictions. The Government's true quarrel is with the Fifth Circuit's analysis of the record, and its speculation that if the District Court had asked the right questions, it would have received the right answers.

III.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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Mr. Joseph Spaniol
Clerk of the United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Re: United States of America v. Mario Bernal
Cause No. 88-1942

Dear Mr. Spaniol:

Enclosed are eleven copies of Respondent's Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, eleven copies of Respondent's Motion for Leave to Proceed in Forma Pauperis and a Certificate of Service in the above referenced matter. Please have one copy of the Brief and one copy of the Motion file stamped and return those copies to me for our files.

Please let me know if I can provide any further information.

Yours truly,

George Lucas Ashley

George Lucas Ashley

GLA:lb
Enclosures
cc: Mr. Kenneth Starr
Mr. Andrew Levchuk
Mr. Matt Orwig
Mr. Mario Bernal
Mrs. Hilda Bernal

,NO. 88-1942

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1988

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UNITED STATES OF AMERICA,

PETITIONER

V.

MARIO BERNAL,

RESPONDENT

On Certiorari to the United States Court of Appeals for the Fifth Circuit

CERTIFICATE OF SERVICE

I, George Lucas Ashley, member of the Bar of this Court hereby certify that on this 25th day of August, 1989, one copy of Respondent's Brief in Opposition to the Petition of Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed first class postage prepaid, to Kenneth W. Starr, Solicitor General, Department of Justice, Washington D.C. 20530, Counsel of Record for Petitioner herein. I further certify that all parties required to be served have been served.

George Lucas Ashley

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COUNSEL OF RECORD FOR RESPONDENT
MARIO BERNAL

Supreme Court, U.S.
FILED
SEP 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1942

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

MARIO BERNAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
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10 pp

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent suggests that we have "manufactured an illusory conflict" among the circuits and have mischaracterized the harmless error framework applied by the court of appeals in this case as "inflexible and artificial." Br. in Opp. 8. Those contentions are without merit.

The conflict among the circuits is manifest, as is clear from the following comparison between the approach taken by the court of appeals in this case and that taken by the Seventh Circuit in *United States* v. *Ray*, 828 F.2d 399, 405 (1987), cert. denied, 108 S. Ct. 1233 (1988):

Bernal

"In *United States* v. *Dayton*, * * * we held *en banc* that a failure by the district court to address Rule 11's core concerns required automatic reversal. * * * In appeals predicated on a failure to comply with Rule 11 —other than a failure to address the core concerns—we apply a harmless error analysis." Pet. App. 4a.

Ray

"A district court's failure to comply with Rule 11(c)(1) is harmless error 'where it can be said from a review of the proceedings that the defendant nevertheless understood the charges.' * * * Whether the defendant has understood will 'vary from case to case, depending on the complexity of the charges and the personal characteristics of the defendant—including age, education, intelligence, alacrity of his responses, and whether he's represented by counsel.'" 828 F.2d at 405.

The automatic reversal rule that the Fifth Circuit adopted in *United States* v. *Dayton*, 604 F.2d 931 (1979) (en banc), cert. denied, 445 U.S. 904 (1980), is inconsistent with Rule 11(h) because it forecloses consideration of the kinds of facts referred to in *Ray*. In this case, for instance, the Fifth Circuit reversed respondent's conviction without considering the nature of the offense, a simple drug distribution charge; the personal characteristics of the defendant, including his education, employment, and fluency in English; and his sworn responses to questions based upon the written plea agreement. Under *Ray*, all of those circumstances would have been relevant to the issue whether any deficiency in the guilty plea proceeding affected respondent's substantial rights. Because the *Dayton* rule precludes consideration of those factors, it departs from the well-established harmless error principles that Rule 11(h) makes applicable to guilty pleas. See *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986) (harmless error inquiry "requires a review of the entire record").

Contrary to respondent's contention (Br. in Opp. 6-8), nothing in the Advisory Committee note accom-

panying Rule 11(h) suggests that courts may dispense with a review of the particular facts of a case based solely upon the nature of the Rule 11 violation in issue. By its terms, the rule applies to "any variance" from the procedures prescribed by Rule 11. While the Advisory Committee provided some examples of the Rule's operation and cautioned against acceptance of "extreme or speculative harmless error claims" (Advisory Committee note (1983 Amendment) to Fed. R. Crim. P. 11(h), 18 U.S.C. App. at 988 (Supp. IV 1986)), the drafters plainly did not suggest that any category of error should trigger "automatic reversal."

2. Respondent also contends that this Court should not grant certiorari on the harmless error question presented in the petition because his conviction was subject to reversal on another ground. He argues that his guilty plea was invalid because it was based on mistaken advice as to the possible term of post-release supervision and a misapprehension, shared by the government and the district court, as to the effective date of the statute under which he was sentenced, Section 1002 of the Anti-Drug Abuse Act of 1986, Pub. L. No. 95-570, 100 Stat. 3207-3 to 3207-4, 21 U.S.C. 841(b)(1)(B) (Supp. IV 1986). Br. in Opp. 10-11. Accordingly, he suggests that his conviction would have to be reversed regardless of the correctness of the Fifth Circuit's analysis of the question presented by the petition. These contentions are without merit, and do not justify denial of the petition.

a. With one possible qualification discussed below, Section 1002 was fully applicable to respondent's offense.[1] Section 1002 was enacted into law on October

[1] With respect to first offenses involving the distribution of 500 grams or more of cocaine, Section 1002 establishes a

27, 1986. Because the Anti-Drug Abuse Act contained no provision postponing the effective date of that Section, the courts of appeals have uniformly held that the increased terms of imprisonment and fines that it authorizes are applicable to all offenses committed after that date. *United States* v. *Levario*, 877 F.2d 1483, 1487 (10th Cir. 1989); *United States* v. *Padilla*, 869 F.2d 372, 381-382 (8th Cir.), cert. denied, 109 S. Ct. 3223 (1989); *United States* v. *Meyers*, 847 F.2d 1408, 1414-1416 (9th Cir. 1988). See *United States* v. *Posner*, 865 F.2d 654, 659-660 (5th Cir. 1989) (upholding sentence imposed under Section 1002 for offense committed between October 27, 1986, and November 1, 1987); *United States* v. *Whitehead*, 849 F.2d 849, 858-860 (4th Cir.) (same), cert. denied, 109 S. Ct. 534 (1988); *United States* v. *Brandon*, 847 F.2d 625, 630-631 (10th Cir.) (same), cert. denied, 109 S. Ct. 510 (1988); *United States* v. *Smith*, 840 F.2d 886 (11th Cir.) (same), cert. denied, 109 S. Ct. 154 (1988); *United States* v. *Levy*, 865 F.2d 551, 559 n.4 (3d Cir. 1989); see also *United States* v. *Portillo*, 863 F.2d 25, 26-27 (8th Cir. 1988) (noting the unanimous position of other courts but reserving judgment on the question). Respondent is therefore wrong in asserting (Br. in Opp. 10) that Section 1002 is inapplicable to offenses committed prior to November 1, 1987.[2]

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mandatory minimum term of imprisonment of 5 years and a maximum term of 40 years; prohibits probation, suspended sentences, and parole; and permits imposition of a fine on an individual of up to $2,000,000. 100 Stat. 3207-3 to 3207-4.

[2] *United States* v. *De Los Reyes*, 842 F.2d 755 (5th Cir. 1988), and *United States* v. *Byrd*, 837 F.2d 179 (5th Cir. 1988), upon which respondent relies (Br. in Opp. 10), address only the availability of *supervised release* for offenses

In this case, respondent entered a plea of guilty to a count alleging that he distributed a kilogram of cocaine on August 2, 1987. Pet. 15 n.9. Because that offense was committed after Section 1002 became effective, the prison terms and fine authorized by that section were applicable. At the plea proceeding, the trial court correctly advised respondent of those potential penalties as modified by the plea agreement's 15-year cap on imprisonment. Pet. App. 23a. Thus, the district court, the prosecutor, and respondent were not mistaken as to Section 1002's applicability, and respondent was under no misapprehension as to the plea agreement's effect on the period of incarceration to which he was exposed.[3]

b. The only possible qualification to Section 1002's applicability to this case concerns the issue of the post-release supervision authorized for respondent's offense. Before respondent offered his guilty plea, the district court advised him that his sentence would include a four-year term of supervised release (Pet. App. 23a), and the court included that sanction in his sentence (C.A. R.E. 16). By its terms, Section 1002 mandates a term of "supervised release" of between four years and life for respondent's offense. However, Section 211 of the Sentencing Reform Act of 1984, 18

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committed before November 1, 1987. Consistent with the decisions of all other courts of appeals, the Fifth Circuit has recognized that prison terms may be imposed under the 1986 statute for offenses committed prior to that date. See *United States* v. *Posner*, 865 F.2d at 659-660.

[3] By entering that agreement, respondent obtained the dismissal of three counts and reduced his exposure to imprisonment without possibility of parole on the remaining count from 40 years to 15 years. Compare Pet. App. 13a with 21 U.S.C. 841(b)(1)(B) (Supp. IV 1986).

U.S.C. 3583 (Supp. IV 1986), which specifies the characteristics of this form of post-release monitoring, did not become effective until November 1, 1987. As a result, the courts of appeals have divided on the question whether this sanction may be imposed for an offense, like respondent's, that was committed after the effective date of Section 1002, October 27, 1986, but before November 1, 1987. Compare *United States* v. *Levario*, 877 F.2d at 1487-1488; *United States* v. *Portillo*, 863 F.2d at 26; *United States* v. *Whitehead*, 849 F.2d at 860; *United States* v. *Smith*, 840 F.2d at 889-890; *United States* v. *Byrd*, 837 F.2d 179, 180-182 (5th Cir. 1988), with *United States* v. *Torres*, 880 F.2d 113 (9th Cir. 1989).

Because the court of appeals reversed respondent's conviction on account of what it found to be an inadequate explanation of the nature of his offense, the court did not address his contention that he could not lawfully be sentenced to a term of supervised release. See Pet. App. 2a n.2. Accordingly, if this Court grants certiorari and reverses the judgment of the court of appeals, that court will have to address the question whether respondent must be resentenced. The fact that that issue might have to be addressed on remand, however, does not affect the appropriateness of this case for this Court's review, since it affects only respondent's sentence and casts no doubt on the validity of his guilty plea and conviction.

Even if respondent could not be sentenced to a term of supervised release (thus rendering the district court's advice concerning his exposure to that form of post-release supervision incorrect), respondent's guilty plea would remain valid. Since respondent was prepared to plead guilty to an offense that, he was ad-

vised, would carry a term of four years of post-release supervision, he necessarily would have been willing to plead guilty if he had known that no post-release supervision would be forthcoming. See *United States* v. *Molina-Uribe*, 853 F.2d 1193, 1198-1199 (5th Cir. 1988).[4] In short, this case squarely raises the question presented by the petition, and that question merits this Court's review.

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SEPTEMBER 1989

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[4] As respondent notes (Br. in Opp. 10), the district court mistakenly suggested that the maximum term of post-release supervision authorized by Section 1002 is four years, rather than life. However, since respondent was sentenced to no more than the maximum term of which he was advised, that error would be harmless even if respondent's conviction and sentence were upheld. See *United States* v. *Khan*, 869 F.2d 661 (2d Cir. 1989); *United States* v. *Sheppard*, 588 F.2d 917 (4th Cir. 1978) (per curiam); Advisory Committee note (1983 Amendment) to Fed. R. Crim. P. 11(h), 18 U.S.C. App. at 989 (Supp. IV 1986).

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